

2010 WL 3971782 (Hawaii App.) (Appellate Brief)
Intermediate Court of Appeals of Hawaii.

STATE OF HAWAII, Plaintiff-Appellee,
v.
Kelii J.B. ACASIA, Jr., Defendant-Appellant.

Nos. 29979, 30042.
August 9, 2010.

Cr. No. 08-1-0774 Appeal from the Judgment of Conviction and Sentence; Notice of Entry and Mittimus, filed on July 13, 2009, First Circuit Court, Honorable Richard W. Pollack Judge
Cr. No. 06-1-0761 Appeal from the Order of Resentencing; Revocation of Probation, filed on July 13, 2009, First Circuit Court, Honorable Steven S. Alm Honorable Derrick H.M. Chan Judges

Opening Brief of Defendant-Appellant and Appendices “A” - “C”

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*1 I. STATEMENT OF THE CASE

Indictment: Defendant-Appellant Kelii J. B. Acasia, Jr. (“Acasia”) was charged by Indictment filed on May 21, 2008 with Count I, Murder in the Second Degree, in violation of [Hawai'i Revised Statutes \(“HRS”\) §§ 707-701.5 and 706-656](#). [Record on Appeal (“RA”): 1-3].

Motions in Limine: On April 1, 2009, the defense filed Defendant's First Motion in Limine. (RA: 271-76). The motion sought to preclude the State from adducing evidence of Acasia's prior bad acts or criminal record. The court granted the motion. (4/3/09 TR: 31-32).

***2 Marcus Perry:** On May 17, 2008 and the early morning hours of May 18, 2008, Perry was in Waikiki. (4/28/09 TR: 19-20). At some point, Perry heard a commotion coming from an area on Kalakaua Boulevard. (4/28/09 TR: 21). Perry heard a “bunch of kids” saying “oh, scrap, scrap.” (*Id.*). When he went to see what was going on, Perry saw a crowd gathering near the roadway. (*Id.*). Perry saw “two younger local boys” fighting with a “little bit older Hispanic male.” (4/28/09 TR: 22-23). The Hispanic male (later identified as Lester Ciudad-Real) had a crew cut and was physically fit, so Perry surmised that he was in the military. (4/28/09 TR: 23). During his testimony in court, Perry stated that one of the local males was wearing a white shirt and black shorts (later identified as Benjamin Pada) and the other had tan shorts but no shirt (later identified as Kelii Acasia). (4/28/09 TR: 23-24). However, in a HPD-458 form used to describe the parties involved, Perry had indicated that Pada was wearing a black tank top and black shorts. (4/28/09 TR: 56). Then in his 252 written statement, Perry had said that the male with black shorts was not wearing a shirt. (4/28/09 TR: 56-57). When confronted with his inconsistent statements, Perry claimed that the male had changed his shirt at some point. (4/28/09 TR: 57). Pada was with a female who appeared to be pregnant. (4/28/09 TR: 49-50). Pada and Acasia were “calling ... out” Ciudad-Real and he was accusing them of stealing his wife's purse and calling them out and taunting them as well. (4/28/09 TR: 24, 64-65). In his written statement, Perry mentioned that Ciudad-Real had “blood coming from the top of his head”, but could not remember that in court until he was reminded of his statement by defense counsel. (4/28/09 TR: 63). Ciudad-Real appeared pretty angry. (4/28/09 TR: 65-66). Perry did not feel it was a fair fight because Ciudad-Real appeared to be a man, while the male in black shorts “was one kid”. (4/28/09 TR: 67). Ciudad-Real went into the street and punched Acasia causing him to fall to the ground. (4/28/09 TR: 25-26, 67-68). Acasia fell, rolled over and began walking away. (4/28/09 TR: 25-26). Perry claimed that Acasia looked “[o]utraged”. (4/28/09 TR: 27). Perry did not see the whole incident and did not know whether Ciudad-Real had struck the pregnant female at some point. (4/28/09 TR: 65-66).

As Acasia was walking away, an older male, Ned Nakoa, came from the crowd and told him “oh, enough fighting already.” (4/28/09 TR: 27). Acasia and Nakoa were about 75 feet away from where Pada and Ciudad-Real were still fighting. (4/28/09 TR: 71). In court, Perry described Nakoa as wearing a “reddish dress shirt”, however, in his written statement he had described Nakoa as wearing a “gray dress shirt”. (4/28/09 TR: 58). When confronted with the inconsistency, Perry stated, “[w]hatever get on the paper is what I seen and saw.” (4/28/09 TR: 60). Nakoa had

began and asked him for a light for his cigarette. (4/28/09 TR: 28-29). Acasia described Nakoa as “soft-spoken”, “humble” and “a little fragile, on the softer side.” (4/28/09 TR: 30-31). Nakoa told Acasia, “Tonight is one beautiful night ... look how beautiful the night. Enough fighting.” (4/28/09 TR: 31). Acasia then “square[d] him off”, struck Nakoa three to four times in his face and kicked him once “on his way down”. (*Id.*). Perry claimed the punches were “knock out punches.” (4/28/09 TR: 32, 73-76). He described the kick as “one pretty hard kick.” (*Id.*). Over the objection of the defense, Perry compared the kick to a punt in football and agreed with the State's leading question that a comparable punt would have been “past the 50 yard line”. (*Id.*). Perry opined that Nakoa did not seem aggressive. (4/28/09 TR: 33). Nakoa appeared to have been unconscious before he hit the ground. (*Id.*). After Nakoa fell, Acasia raised his hands, pointed to his “back side” and said “west side ... [l]ike he was representing where he come from.” (4/28/09 TR: 34-35). Acasia walked off toward Kapahulu and Pada and Ciudad-Real began “tangling around” until the police arrived. (4/28/09 TR: 35). There had been a girl in the area that seemed to be with Acasia. Perry did not recall the girl getting knocked down or getting “in between” Acasia and Nakoa. (4/28/09 TR: 39).

After being confronted with several inconsistencies between his trial testimony and written statements he had given to the police describing the incident, Perry stated, “Whatever get on the paper is what I seen and saw. That's more or less what time went happen. This is one year later. ... I get hard time remember last month.” (4/28/09 TR: 60).

Later that evening, the police took Perry to Lemon Road and asked him to identify Acasia. (4/28/09 TR: 35). Perry identified Acasia by his face, his clothing and his tattoos. (4/28/09 TR: 35-36, 38). Perry identified State's Exhibit “2” as a photograph of Nakoa. (4/28/09 TR: 36-37).

Bruce Wilkinson: On May 17 and May 18, 2008, Wilkinson was in Waikiki to meet his friends at Lulu's Bar and Grill. (4/28/09 TR: 96). At around midnight on May 17, he was walking from Cold Stone Creamery to Lulu's with his friends when they noticed a crowd gathering across the street. (4/28/09 TR: 83, 96). When Wilkinson and his friends crossed the street, they saw three males, a Caucasian male who was “husky” and approximately “six-one” (Ciudad-Real), a local male with a “tattoo on his back of a zip code” (Acasia) and another local male (Pada). Two of the males were fighting and the third was “standing by.” (4/28/09 TR: 106). Acasia was wearing tan shorts and Pada was wearing either jeans shorts or pants cut off at the knees. (4/28/09 TR: 84-85). Acasia and Pada appeared to be trying to “antagonize” Ciudad-Real into fighting back. Ciudad-Real's “face *4 was already bloodied up” and he had blood on his shirt. (4/28/09 TR: 86). Ciudad-Real blocked a punch, but Wilkinson could not recall who had thrown the punch. (4/29/09 TR: 99).

At some point Acasia began to walk away. When he got about 30 to 40 feet away, Acasia had “an encounter” with a neatly dressed older man (Nakoa) who was about 5'5" tall.¹ (4/28/09 TR: 86-87). Nakoa was making hand gestures and appeared to be trying to calm down Acasia. Nakoa pointed in the opposite direction and Wilkinson assumed that he was telling Acasia to leave. (4/28/09 TR: 89). Wilkinson did not see Nakoa touch Acasia and was telling him to leave before the police showed up. (*Id.*). Acasia did not appear hostile, but seemed “jumpy”. (4/28/09 TR: 90). Wilkinson believed that at some point Nakoa said something or pushed Acasia. Acasia then pushed Nakoa with two hands to his chest and Nakoa “stumbled backwards.” (4/28/09 TR: 91, 113-14). Acasia hit Nakoa once in the face between the eyes but did not hit Nakoa “full force”. (4/28/09 TR: 92, 114-16). Nakoa fell to his knees and Acasia hit him in the face. Nakoa slumped onto his right side and Acasia either reached down or bent down to see something. (*Id.*). Acasia kicked Nakoa in the upper chest area and then took off in a “dead sprint” across the street. (4/28/09 TR: 92-93, 117). Nakoa was on the ground “moaning and groaning.” (*Id.*). Wilkinson recalled a female being in the area, but did not “have any clear memory of anything that really pertained to her.” (4/28/09 TR: 95).

Wilkinson's description of Acasia at trial differed markedly from the description he had written on his statements to the police immediately after the incident. (4/28/09 TR: 121-22). In the “suspect/weapon/vehicle description form”, Wilkinson had indicated that the male with the tattoo had been wearing blue jeans and tennis shoes. (*Id.*). Wilkinson claimed that the police had been rushing him and that he had been told to check off descriptions attributed to both suspects on the same form. (4/28/09 TR: 122-24). Wilkinson also admitted that the police had coached him on how to fill out the forms, telling him, “add this and

then add this, and you make sure in the statement you say this.” (4/28/09 TR: 125). After filling out his initial statement, the police had made Wilkinson write a second statement. (4/28/09 TR: 125-26).

Erik Cantera: On May 17, 2008 and the early morning hours of May 18, 2008, Cantera was at Lulu's. (4/28/09 TR: 128-29). Cantera heard a commotion and saw other patrons go towards the balcony. (4/28/09 TR: 129-30). When Cantera walked out to the balcony, he saw “an older man and a younger man” about 50 to 60 yards away. (4/28/09 TR: 131, 144). The younger man *5 (Acasia) looked “pumped up” and the older man (Nakoa) was “attempting to use his own personal body space” to move Acasia back. (4/28/09 TR: 132-33). Nakoa appeared to be “calm, gentle, and he wasn't showing any aggression.” (4/28/09 TR: 134). Acasia was “medium build”, did not have a shirt on and was wearing silver shorts with a black stripe or insignia on the side and white running shoes. (*Id.*). Cantera could not recall what Nakoa wearing, but described him as “frail” with an older build. (4/28/09 TR: 134-35, 148). Nakoa appeared to be trying to move Acasia away from “the commotion”. Nakoa had his hands up and was shaking his head. (4/28/09 TR: 135). Nakoa was able to move Acasia about 15 yards back, down the length of a “grassy area.” (4/28/09 TR: 149-50). Acasia then hit Nakoa in the face two to three times. (4/28/09 TR: 136). The blows caused Nakoa's head to go backwards. (4/28/09 TR: 137). Nakoa began to fall to the ground, fell to one knee while holding his face and then fell into a “prone position laying on his stomach”. (4/28/09 TR: 138). Acasia kicked Nakoa two to three times in the face. (4/28/09 TR: 139-40). Acasia paused for a second and then began running on Paoakalani St. (4/28/09 TR: 140). Cantera could not see whether Nakoa had sustained any injuries from the blows. (4/28/09 TR: 152).

Cantera later walked back to the Waikiki Beachside Hostel on Lemon Road. (4/28/09 TR: 142). He saw the police arresting a male that he believed was Acasia. (4/28/09 TR: 143).

Galen China: On May 18, 2008, Ching was working as a security guard for “Guard Smart” and was assigned to the Resort Quest Waikiki Beach Hotel at the corner of Paoakalani Street and Kapahulu Avenue. (4/28/09 TR: 157-58, 167). The entrance to the hotel's lower parking level was located at the corner of Lemon Road and Paoakalani Street. (4/28/09 TR: 159). There was a gate at the entrance to the parking garage and only valet-parked guests' cars were allowed to enter the parking garage. (4/28/09 TR: 159). As Ching was completing his patrol, he noticed that a “local male” (Acasia) had jumped over the wall into the lower parking garage. Ching notified his supervisor that there was an “intruder in the lower parking area.” (*Id.*). Acasia was not wearing a shirt and had tan shorts on. Ching described him as approximately 5' 7" tall and 160 pounds. (4/28/09 TR: 160).

Ching and his supervisor went to the lower parking area and found Acasia in the “middle of the service elevator area”, next to the women's locker room. (4/28/09 TR: 160). Ching asked Acasia if he was lost and he replied that “someone was attempting to assault him” and that his mother was staying the hotel. (4/28/09 TR: 161-62, 171-73). Acasia was sweaty and looked “scared” and “[e]motional”. (4/28/09 TR: 171). Ching asked Acasia for his mother's name but he *6 didn't answer and instead ran away. (*Id.*). Ching tried to follow Acasia for a short distance and then reported back to his supervisor. (4/28/09 TR: 162). Ching's supervisor had called the police. Ching met with the police on Lemon Road and escorted six to seven officers back to the parking garage. (*Id.*). Ultimately one of the officers located Acasia in the parking garage. (4/28/09 TR: 163-64). Ching identified State's “5”, “15” and “16” as photographs of Acasia. (4/28/09 TR: 164-65). When Acasia was apprehended, there was a “physical scuffle”. (4/28/09 TR: 180).

Edward Clattenburg: On May 17 and the early hours of May 18, 2008, Clattenburg witnessed two incidents in Waikiki. (4/28/09 TR: 183-84). Clattenburg and two friends were outside of Tiki's Bar & Grill, at the intersection of Paoakalani Street and Kalakaua Avenue when they heard a commotion coming from across the street. (4/28/09 TR: 184). Clattenburg saw a crowd of people and two people who appeared to be “squaring off to fight.” (4/28/09 TR: 187, 202). He then heard yelling and noticed three people walking toward him. (*Id.*). Clattenburg saw two males, one in his early 20's and one in his 50's or 60's, and female in her 20's. (4/28/09 TR: 188). The younger male did not have a shirt on and was wearing white board shorts. (4/28/09 TR: 189, 210). The older male was wearing a black long-sleeve shirt and black pants and appeared to have something, possibly a cup, in his hands. (*Id.*). The older male was between the younger male and female. (4/28/09 TR: 189-90). The female was loudly arguing with the older male. The older male was talking back to the female and the situation appeared to be escalating. (4/28/09 TR: 190-91). Clattenburg believed that the female was the aggressor, “based off of her body language” which he described as

“aggressive ... leaning in yelling at the older man.” (Id). The three stopped about 15 feet away from Clattenburg and the “yelling argument got louder.” (4/28/09 TR: 191). The younger male appeared to be yelling at the older male for yelling at the woman. (4/28/09 TR: 192). Clattenburg claimed that the younger male was more aggressive than the older male. (4/28/09 TR: 193). The yelling stopped for a few seconds and then the younger male turned to face the older male and struck him in the face with his right hand. (4/28/09 TR: 195). Clattenburg could not see exactly where the blow made contact with the older male's face. (4/28/09 TR: 215). The older male “crumbled down” to the ground on his back and right side and was motionless. (4/28/09 TR: 197, 215-16). The younger male stepped over the older male, straddling him, bent over at the waist and hit the older male two to three more times in the face. (Id.). The younger male stood up, walked around the older male and then kicked him in the side of the head. (4/28/09 TR: 198, 218). The younger male walked about five to ten feet away, yelled out “west side”, took a few more steps *7 and yelled out “Waianae” and then began crossing the street and walking up Paoakalani Street. (4/28/09 TR: 199). The female went over and spoke to the younger male. After they had spoken, the younger male crossed the street and then began to run up Paoakalani Street. (4/28/09 TR: 200).

Clattenburg approached the older male to see if there was anything that he could do. The older male's face was bloody, so Clattenburg did not think it was safe to perform CPR on him. He stayed there for about a minute until the police officers arrived. (4/28/09 TR: 200).

On cross-examination, Clattenburg acknowledged that he had filled out a form for the police indicating that the female was possibly wearing a “USC” sweatshirt. In describing the younger male, Clattenburg had not indicated that the younger male had a tattoo, even though there was a box on the form that could have been marked off to indicate tattoos. (4/28/09 TR: 208-09). Clattenburg could not recall the younger male having any tattoos. (4/28/09 TR: 210). The older male did not use his personal body space to push the younger male back to the nearby grassy area or put his hands up in any way. (4/28/09 TR: 213).

On May 25, 2008, Clattenburg met with detectives. He told the detectives that he would not be able to recognize the younger male's face. (4/28/09 TR: 220).

Shinnosuke Suga: On May 18, 2008 Suga was an emergency medical technician (“EMT”) employed by the City and County of Honolulu. (4/29/09 TR: 5-6). At 12:19 a.m., Suga, his partner and “CT Dan Kohara” were dispatched to an incident that had occurred at the corner of Kalakaua Avenue and Paoakalani Street. (4/29/09 TR: 6-7).

When Suga arrived, he saw Nakoa supine, on his back, on the sidewalk on the ocean side of Kalakaua Avenue. (4/29/09 TR: 7). Nakoa was not breathing, had no pulse and no “high rhythm on the cardiac monitor.” Nakoa was in “critical” condition, so Suga provided a “basic” pure oxygen airway. (4/29/09 TR: 7-8). Nakoa was transported to Queen's Hospital and arrived there at approximately 12:40 a.m. (4/29/09 TR: 8).

The “Hawai'i EMS report” prepared by Suga's partner, indicated that bystanders had told him “the patient had been punched one time to the head by another male and fell back hitting his head on the ground.” (4/29/09 TR: 14). Suga could not recall any obvious trauma to Nakoa. (4/29/09 TR: 17).

HPD Officer Wade Tamarra: On May 18, 2008, Tamarra responded to an “assault complaint” at the intersection of Kalakaua Avenue and Paoakalani Street. (4/29/09 TR: 24). Tamarra then went to Lemon Road based on information that the suspect was possibly on Lemon Road running toward *8 Paoakalani Street. (4/29/09 TR: 25). Upon reaching Lemon Road, Tamarra was flagged down by a security officer (Galen Ching) who reported seeing a “local male with no shirt” running onto the hotel parking structure. (4/29/09 TR: 26). Tamarra and some security officers began to search the parking area. (4/29/09 TR: 28). Tamarra found Acasia lying facedown, with half of his body under a Honda Civic. (4/29/09 TR: 30-32). Acasia did not respond when Tamarra identified himself as a police officer, so Tamarra approached, shook him and asked if he was okay. Acasia then “uttered, The haole guy was trying to assault me. The haole guy started it.” (4/29/09 TR: 34). Acasia had no shirt on and was wearing tan shorts. (4/29/09 TR: 35). Acasia had a tattoo of the zip code “96792” on the top of his back. (4/29/09 TR: 36-37).

HPD Officer Eun Sik Choi: When Choi arrested Acasia on May 18, 2008, Acasia gave his name as “Keahi Acasia”. (4/29/09 TR: 51-52).

Stipulation: The parties stipulated that on May 18, 2008 at 10:25 a.m., Nakoa was pronounced dead and to the identification and chain of custody of Nakoa's body. (4/29/09 TR: 52).

Medical Examiner Dr. Kanthi DeAlwis: DeAlwis was qualified as a “medical expert with a specialty in forensic pathology.” (5/1/09 TR: 8). On May 19, 2008, DeAlwis performed an autopsy on Nakoa. (5/1/09 TR: 9). Nakoa was approximately 69” tall and weighed 143 pounds. (5/1/09 TR: 10).

DeAlwis opined that the cause of death was “tearing of... a blood vessel that sits at the basal portion of his brain as a result of assaultive head trauma. That is blunt force injury to the head that may have caused the head to hyperextend which stretched that blood vessel that sits at the base of the brain to tear.” (5/1/09 TR: 11). She termed such an injury as a “subarachnoid hemorrhage”. DeAlwis explained that a blow to the face, chin or back of the face could cause the vertebral artery to tear from hyperextension of the head causing sudden death. (5/1/09 TR: 12-13). In the case of Nakoa, DeAlwis opined that the “assaultive head trauma” had been caused by a punch or kick. (5/1/09 TR: 22-23). In general such injuries occurred when the head was in a “moveable position” that allowed it to move backwards or to the side thereby suddenly snapping back or rotating and stretching and breaking the arterial wall. (5/1/09 TR: 23-24). Assaultive head trauma injuries were not generally caused by a person falling and striking their head on the ground, “[b]ecause the head has to either move back or a sudden rotation.” (5/1/09 TR: 24-25). It was not unusual to find only minor “visible external injuries” in such situations. (5/1/09 TR: 27). Nakoa had sustained a superficial scrape on his forehead, likely when he fell to the ground and a superficial (“diffusely *9 scattered and faint”) ² bruise on his forehead, possibly from a blow to that area. (5/1/09 TR: 29-30, 34-35). The bruise was “more consistent with a punch or blow” than from falling to the ground. (5/1/09 TR: 30). There were no injuries to fairly fragile areas of the face, such as the eye socket, nose, jaw or teeth, or lacerations or avulsions. (5/1/09 TR: 40-43). There was no bruising to Nakoa's jaw or chin. (5/1/09 TR: 45). DeAlwis opined that the subarachnoid hemorrhage that caused Nakoa's death was more likely caused by a punch than a kick. (5/1/09 TR: 31-32).

Over the objection of the defense, the court allowed the introduction of several morgue photographs of Nakoa: State's “8” (photograph of Nakoa's opened chest to show injuries); State's “7” (photograph of scalp pulled back to expose skull); and State's “9” (photograph of brain). (5/1/09 TR: 14-22). The defense objected that the photographs were more prejudicial than probative. (*Id.*). Also entered into evidence without objections were State's “6” (photograph of Nakoa's face) and “10” (photograph of torn blood vessel). (5/1/09 TR: 20, 28).

There was bleeding underneath the tissues in the area of Nakoa's “left side around the shoulder, the chest, and the collarbone area” that was consistent with a kick or punch. (5/1/09 TR: 31). However, there were no external injuries to that area. (5/1/09 TR: 45-46).

Nakoa was suffering from cirrhosis, or scarring, of the liver, likely in response to damage that had occurred repeatedly over his lifetime. (5/1/09 TR: 44-45). Cirrhosis of the liver would cause a person to bleed and bruise more easily. (5/1/09 TR: 44-45). The toxicology report showed a high level of alcohol in Nakoa's blood (.217 grams per deiliter), a condition DeAlwis described as “acute alcohol intoxication”. (5/1/09 TR: 47). Such a high level of intoxication would cause decreased coordination and reflexes. (5/1/09 TR: 50-51). In DeAlwis' experience, 80% of the cases where death had occurred due to sudden hyperextension of the head occurred where the decedent was intoxicated. (5/1/09 TR: 53).

Motion for Judgment of Acquittal: At the close of the State's case, the defense made a motion for judgment of acquittal. (5/1/09 TR: 57). The court denied the motion. (5/1/09 TR: 57-58).

Reading of transcript of taped interview of Lester Ciudad-Real by Det. McCormick (Defense Exhibit “A”): On May 17, 2008 and the early morning hours of May 18, 2008, Ciudad-Real was in Waikiki with his girlfriend Wapokunie Riel. (4/29/09 TR: 60-61). Ciudad-Real and Riel were on the beach when a group of five males and a pregnant female approached them. (4/29/09 TR: 61- *10 62). A male with no shirt on who was wearing black shorts came up behind Ciudad-Real, kicked him in the back of his head and then grabbed Riel's purse and ran. Ciudad-Real chased the shirtless male across Kalakaua Avenue. Another male who Ciudad-Real assumed was the shirtless male's friend stepped in front of Ciudad-Real. Ciudad-Real punched the male and then punched the shirtless male. The shirtless male dropped the purse and fell to the ground. (4/29/09 TR: 62). Another male wearing a white t-shirt and white hat then approached and began “squaring off with Ciudad-Real in the street. (*Id.*). The male in the white t-shirt threw several punches that missed and then ran away. The shirtless male then punched Ciudad-Real in the left eye and after a “good amount of time” where Ciudad-Real was trying to grab him, the shirtless male fled. (4/29/09 TR: 63).

Ciudad-Real turned to his left to check on Riel and saw the male in the white t-shirt punch an “elderly man”. The elderly man fell and the male in the white t-shirt kicked. Another male wearing a black t-shirt, black shorts and black sneakers, then approached and kicked the elderly male once as well. (*Id.*). The male in the white t-shirt then ran down Paoakalani Street. Ciudad-Real chased the male, but was unable to catch him. (*Id.*).

As he walked back, Ciudad-Real saw the shirtless male in the middle of a crowd “walking down towards the street.” (4/29/09 TR: 63-64). The male in the black t-shirt and black shorts (the same one that had kicked the elderly male on the ground), handed the shirtless male a black object. (4/29/09 TR: 64, 69-70). When Ciudad-Real went to grab the shirtless male, the shirtless male hit him on the left side of his head with the black object. Subsequently the police arrived and Ciudad-Real pointed out the male in the white t-shirt who was coming back up the street. The shirtless male then ran into the “outskirts” of a nearby hotel. Ciudad-Real attempted to follow the shirtless male into the parking garage of the hotel, but was stopped by the police. (4/29/09 TR: 64-65). The police later arrested the shirtless male in the parking garage. (4/29/09 TR: 65).

Ciudad-Real identified the shirtless male as the male who had initially stolen the purse and hit him in the head. (4/29/09 TR: 65). Ciudad-Real also identified the male in the white t-shirt as the person who had punched the elderly male in the face and then kicked the elderly male when he fell to the ground. (4/29/09 TR: 66-69). When the police brought the male in the white t-shirt for identification, he was no longer wearing a white t-shirt, white hat or a gold necklace. (4/29/09 TR: 71). Ciudad-Real identified the male in the black t-shirt and black shorts and the person who had also kicked the elderly male after he fell to the ground. (4/29/09 TR: 69-70).

***11 Reading of transcript of grand jury testimony of Ciudad-Real:** On May 17, 2008, Ciudad-Real and Riel were laying down at the beach. (4/29/09 TR: 73). A group of males and a pregnant female approached and one of the males kicked Ciudad-Real in the back of the head and grabbed Riel's purse. The male was wearing black shorts and did not have a shirt on. Ciudad-Real described the male as “short, [with] dark skin” and local or of “Asian descent. (4/29/09 TR: 74). Ciudad-Real chased the shirtless male to the street. As he caught up with the shirtless male, another male got in the way. Ciudad-Real punched the male and then caught up with the shirtless male. (4/29/09 TR: 74). Ciudad-Real hit the shirtless male causing him to fall and drop the purse. (4/29/09 TR: 75). A male wearing a white t-shirt then approached and “squared off with Ciudad-Real. (*Id.*). They threw a few punches and the male in the white t-shirt ran away. The male in black shorts “came back in front of Ciudad-Real again, but Ciudad-Real was unable to catch him. (4/29/09 TR: 76-77). At some point the male with black shorts hit Ciudad-Real near his eye. (4/29/09 TR: 85).

Ciudad-Real looked to the left to check on Riel and saw the male in the white t-shirt hit another male. The male fell to the ground and the male in the white t-shirt kicked him in the face. (4/29/09 TR: 77). Another male wearing a black t-shirt, black shorts and black sneakers also kicked the male in the “face area”. (*Id.*). The male in the white t-shirt began to run away and Ciudad-Real chased him but was unable to catch him.

Ciudad-Real began walking back and saw the male in the black shorts walking toward him with a group of people. One of the people handed the male a “black object”. Ciudad-Real went to grab the male in the black shorts and the male hit him with the

black object on the side of the head. (4/29/09 TR: 78, 85-86). Ciudad-Real began chasing the male in the black shorts until the police arrived. (4/29/09 TR: 78-79).

When the police arrived, the male in the white t-shirt returned. Ciudad-Real pointed him out to the police and they began to chase him. (4/29/09 TR: 79). The male in the black shorts ran away, so Ciudad-Real chased him into a nearby hotel. Ciudad-Real lost sight of the male, but the police later found him in the hotel's parking garage. (4/29/09 TR: 79-80). Ciudad-Real had an injury near his left eye and on the left side of his head. (4/29/09 TR: 80). The male in black shorts with no shirt on who had taken Riel's purse, was not the same male in black t-shirt, black shorts and black shoes that had kicked the male on the ground. (4/29/09 TR: 82).

***12 Stipulated entry of photographs of Nakoa's clothing:** Several photographs of Nakoa's clothing were stipulated into evidence: Defense's "L", Nakoa's trousers; Defense "M", Nakoa's jacket; and Defense "P", belongings recovered from Nakoa. (4/29/09 TR: 88-89).

Brianne Yoro-Leong (aka Kiana): On May 17, 2008, Kiana went to a concert at the Waikiki Shell with her friends, including Janere Quijano. (4/29/09 TR: 92-93). After the concert, they "walked around the strip" near the beach. (4/29/09 TR: 93-94).

At about midnight, Kiana saw a "Hispanic" male chasing a shorter, younger male. (4/29/09 TR: 95). The situation caught her eye, so Kiana walked across the street to watch. (4/29/09 TR: 97-98). The males began fighting. (4/29/09 TR: 99).

To the side of them, Kiana saw a "young man hit an older man." (4/29/09 TR: 99-100). The young man was not wearing a shirt and he had a tattoo of "numbers" on his back. (4/29/09 TR: 111). The older man "spun" and then fell on the ground "face forward." (4/29/09 TR: 100). The old man appeared to be trying to breathe. Kiana did not see the young man do anything to the old man on the ground such as hit or kick him. (4/29/09 TR: 101-02). The young man then ran across the street. (4/29/09 TR: 102).

Quijano, had taken a cell phone video of what had happened. (4/29/09 TR: 103). Quijano later gave the phone with the video on it to the police. (4/29/09 TR: 104). **Janere Quijano:** On May 17, 2008, Quijano was walking on the sidewalk in Waikiki with his friends, including Kiana. (4/29/09 TR: 114). At about midnight, Quijano saw a "bald, Mexican-looking guy" chasing a "local" guy. The Hispanic male was "bigger and buffer" than the local male. (4/29/09 TR: 115). Quijano began taking a video with his cell phone and followed the males across the street. (4/29/09 TR: 116-17). The males began throwing punches as Quijano watched and recorded the incident on video. (4/29/09 TR: 117-18). A CD copy of the video from the phone was entered into evidence as Defense "C". (4/29/09 TR: 118-19).

At some point, Quijano turned and saw an old man fall on his knees and then fall face forward on the ground. (4/29/09 TR: 120-22). There was a male with a tattoo of "[I]etters and numbers" near the old man, but Quijano did not see what had caused the old man to fall. (4/29/09 TR: 120-21, 140-41). After the old man fell to the ground, a "Local girl" with curly hair kick the old man. The girl said, "That's what you get for doing something or touching me." (4/29/09 TR: 130-32). The girl kicked the old man in his upper body, around the head or shoulder area. (4/29/09 TR: 132-33). The girl then walked away. (4/29/09 TR: 133-34). This incident was not captured on ***13** video because Quijano was still pointing the cell phone at the incident between the Hispanic male and the local male at the time. (4/29/09 TR: 133-34). Quijano gave the cell phone with the video on it to the police and was later interviewed by the police. (4/29/09 TR: 134-35).

Kelly Kaluna (aka Anela): Anela was Acasia's girlfriend. (4/29/09 TR: 144-45). On May 17, 2008, Anela met Acasia near the "Waikiki Wall" at around 2:00 p.m. Anela was about three to four months pregnant at the time. (4/29/09 TR: 148). Acasia was with his brother Keola and some friends. (4/29/09 TR: 146). At some point they decided to go to the park near the Waikiki Shell to "[c]ruise in the park, have barbecue with [Acasia's] friends." (4/29/09 TR: 147). There was also a reggae concert at the Waikiki Shell. (*Id.*). Acasia's friends drank some alcoholic beverages, but Anela and Acasia did not drink. (4/29/09 TR: 148).

At some point, Acasia and Anela decided to meet up with a couple of their friends, Ben Pada and Zandria Lewis, and walk around in Waikiki. (4/29/09 TR: 148-49). Pada and Lewis had not been at the barbecue. (4/29/09 TR: 149). Lewis was also pregnant at the time (approximately seven months). (4/29/09 TR: 149-50). They made arrangements to meet at the pavilion near the Waikiki Wall. (Id).

Acasia, Anela, Keola and “a couple other people” met Pada and Lewis at the pavilion and then walked down the street to the International Marketplace. (4/29/09 TR: 150). They met up with some other friends and decided to go to the beach to drink. (4/29/09 TR: 151). Acasia, Anela, Pada, Lewis, Keola and a “couple other people” then went down a nearby “alley” to get to the beach. (4/29/09 TR: 151). As they were walking down the alley, Anela saw Pada run past her with another guy, “an old Japanese guy”, chasing him. (4/29/09 TR: 151-52). The “old guy” was telling Pada to give him back his wallet. (4/29/09 TR: 152). Anela then heard someone tell Lewis that “all he wanted back was his passport”, so she decided to try to get the passport from Pada. Anela maintained that she was scared and that she wanted to get the passport so “the trouble would stop.” (4/29/09 TR: 153-54).

Anela, Acasia and Keola began walking back toward the Waikiki Wall because she believed that Pada would return to that area. (4/29/09 TR: 155). When they got there, Pada was there and Anela asked him for the passport. (4/29/09 TR: 156). Anela told Pada that the guy wanted his passport back, but Pada claimed that he did not have it. (*Id.*). Anela felt scared for Lewis and mad because of the trouble that Pada had caused, so she decided to go home. (4/29/09 TR: 156-57).

***14** As they were walking, they saw one of Acasia's friends and her boyfriend arguing. (4/29/09 TR: 157). Acasia and Pada wanted to see what was happening, so they approached and talked to the girl. (4/29/09 TR: 157-58). Anela waited for them by the “first pavilion” near the beach. (4/29/09 TR: 158).

Subsequently Acasia returned and they were just turning to “tell everybody bye” when Anela saw Pada running from the beach toward the road with another male chasing him. (4/29/09 TR: 158). The other male was Hispanic, “tall ... light skinned and [had] little hair.” (4/29/09 TR: 159). Pada was carrying a purse. (4/29/09 TR: 180-81). When they reached the corner near Lulu's, the Hispanic male hit Keola in the face and then hit Pada in the mouth. (4/29/09 TR: 161). Pada fell to the ground and Lewis rushed in to try and help him. Lewis tried to hold back the Hispanic male, but he hit her too. (4/29/09 TR: 162-63). Anela heard Acasia calling her name, so she began to walk toward him. (4/29/09 TR: 163).

As Anela approached, she saw an “old-looking guy”, Nakoa, with a cup of beer in his hand trying to hold Acasia back. (4/29/09 TR: 163-64). Nakoa was pushing Acasia and Anela believed that Acasia was getting mad. (4/29/09 TR: 164). Anela told Nakoa that Acasia was her boyfriend, but he continued to push Acasia back with one hand. (4/29/09 TR: 165). Anela told Nakoa that they were just going home, but he responded by shoving her away and then hitting her in the mouth. (4/29/09 TR: 165-66). Anela told Nakoa not to hit her and then Acasia hit him once in the face. (4/29/09 TR: 166-67). Nakoa fell to the ground face first. Acasia did not hit or kick Nakoa after he fell to the ground. (4/29/09 TR: 167-68). Anela told Acasia to go and he ran away down the street. (4/29/09 TR: 168). Anela did not see Acasia again that night. (4/29/09 TR: 172).

On May 21, 2008, Anela was interviewed by the police. (4/29/09 TR: 168-69). Anela showed them the injury to her upper lip and a photograph was taken (Defense “J”). (4/29/09 TR: 169-71). During the interview, Anela stated that she had walked to Waikiki with Acasia from McCully instead of meeting him there. (4/29/09 TR: 177-78). She stated that she had been about 15 to 20 steps away when Pada had taken the purse and that after grabbing the purse he had kicked the Hispanic male in the head and run away laughing. (4/29/09 TR: 180-82). As they ran past, Acasia had run after them and Acasia and Pada had been “dancing around like a fighter” with the Hispanic male. (4/29/09 TR: 182-83). She had also told the detectives that Mana, Keola, Acasia and Pada had been “scrapping” with the Hispanic male, but explained that she had meant that the Hispanic guy had been trying to hit them. (4/29/09 TR: 183, 192-93). She clarified that the ***15** Hispanic male was “acting crazy” and that he was the aggressor. (4/29/09 TR: 193). When Nakoa was trying to hold Acasia back, Anela had told him that Acasia was her boyfriend and that she could calm him down. (4/29/09 TR: 184-85). Anela had begun to apologize to Nakoa when he hit her with an open hand above her lip and under her nostril. (4/29/09 TR: 184, 194). Anela also stated that she had been grabbed and pushed on her face by Nakoa. (4/29/09 TR: 186). Anela had only seen Acasia hit Nakoa once, but had looked away after. (4/29/09 TR:

187). However, she maintained that Acasia had only hit Nakoa once and that he had not kicked him. (4/29/09 TR: 196). Anela told the detectives that Nakoa did not deserve to get hit. (4/29/09 TR: 187-88).

During cross-examination, the deputy prosecuting attorney asked Anela if she and Acasia would “hang out at your home” because Acasia was homeless. (4/29/09 TR: 174).

Aaron Nunes: On May 17 and May 18, 2008, Nunes, who lived in California, was staying in a room on the 10th floor of the Resort Question Waikiki with his wife Sara. (5/1/09 TR: 58-59). At sometime around midnight on May 17, Nunes heard a woman screaming and went out to his balcony to see what was happening. (5/1/09 TR: 61). He saw two “altercations” going on. In one incident a “young man in black board shorts” was being chased by a man in a white t-shirt. (*Id.*). The man in black board shorts was running and jumping over things to get away from the other man. (5/1/09 TR: 62). In the other altercation, another “young man in white board shorts with no shirt and no shoes, was being directed away from the other altercation by an older gentleman.” (5/1/09 TR: 61). It appeared that the young man with no shirt was trying to get involving in the other altercation and the older man was trying to “keep him out of that situation.” (5/1/09 TR: 63). The older man had his arms “outstretched”, extended horizontal to the ground, and was “mirror[ing]” the young man to stay in front of him. The older man would also “gesture away from the altercation”. (5/1/09 TR: 63-64). It appeared to Nunes that the younger man could have gotten around the older man, but that he was “letting the gentleman stop him.” (5/1/09 TR: 64). After about 30 to 45 seconds, the younger man made a “forward gesture” toward the older man. Nunes' view was partially blocked by a palm tree so he could not see exactly what happened, but the older man then fell down face first. (5/1/09 TR: 64-65). The younger man looked down at the older man and made “a gesture ... an arm movement of some sort.” It appeared that the younger man realized that the older man was hurt, so he “sprinted off” down Paoakalani Street. (5/1/09 TR: 66). People came forward to help the older man and one person rolled him over on his back. (5/1/09 TR: 68). *16 Nunes and his wife decided to go downstairs to see if they could help. (*Id.*). Nunes did not see any incident between Nakoa and any female in the area. (5/1/09 TR: 74).

When they got downstairs, the police had apprehended the male in the black board shorts. (5/1/09 TR: 69). Subsequently the police apprehended the male in the white board shorts and asked Nunes if he could identify him. The male still was not wearing a shirt. (5/1/09 TR: 69-70).

Keola Acasia: Keola was Acasia's brother. (5/1/09 TR: 78). On May 17, 2008, Keola had met up with Acasia, Anela and a few friends at Waikiki Beach. (5/1/09 TR: 79). After they went swimming at the beach, they decided to go to Kapiolani Park to listen to a concert at the nearby Waikiki Shell. (5/1/09 TR: 80). Keola had three beers at the park. (*Id.*). At some point, Keola, Acasia, Anela and a couple of Acasia's friends left the park and went to Waikiki to meet up with some of Keola's friends. (5/1/09 TR: 81-82). They met at the wall and then walked back to Kapiolani Park to listen to the concert at the Waikiki Shell. (5/1/09 TR: 82-83).

After the concert had finished, Keola, Acasia, Anela, Pada and Pada's girlfriend Zandria decided to walk through Waikiki. (5/1/09 TR: 83-84). Eventually they ended up at the beach behind the Royal Hawaiian Shopping Center. While at the beach, Pada “came across” a purse that some tourists had left on a trash can while they were taking pictures. (5/1/09 TR: 84-85). Pada took the purse and then ran back toward the Waikiki Wall. (5/1/09 TR: 85). Keola and Acasia decided to go after Pada and get the purse back because they didn't want any trouble. (5/1/09 TR: 85).

Keola and Acasia eventually caught up with Pada on the beach near the statue of Duke Kahanamoku. (5/1/09 TR: 86). They told Pada that the tourist only wanted her passport back, but Pada told them that it was too late because it was “somewhere in the sand.” (5/1/09 TR: 86-87). Keola and Acasia decided that they couldn't do anything, so they all walked over to a pavilion near the beach, drank a little more and met some of Acasia's friends. (5/1/09 TR: 87). One of Acasia's friends got into a domestic altercation, so Acasia and Keola went to “check it out.” (5/1/09 TR: 88). When they returned, Pada went down to the beach, approached a couple lying on the sand, kicked them and “snatched the purse.” (*Id.*). Pada began running toward the street and the male followed. Keola was drinking water and as the male passed by he punched Keola in the face. (5/1/09 TR: 89). Keola punched the male back, but he continued chasing Pada on the street in front of the pavilion. (*Id.*). The male was “just whacking

whoever”, “punching all kine people”, and then approached *17 Acasia. They “went square off, but did not throw punches at each other. (5/1/09 TR: 90-91). Keola was not sure whether the male had hit Zandria. (5/1/09 TR: 126).

Keola, Acasia and Anela were standing by the pavilion when an older man holding a beer can approached them. (5/1/09 TR: 92). The older man mumbled something to them and Anela responded, “Oh, I got my boyfriend under control, so just go.” (Id). The older man then swung at Anela and hit her somewhere on her upper body. (5/1/09 TR: 93). After the older man struck Anela, Acasia hit him one time in the head. (Id.). Acasia ran across the street and when Keola turned back he saw the older man lying on his back on the sidewalk. (5/1/09 TR: 93-94). Keola did not see Acasia hit or kick the older man again. (5/1/09 TR: 95). As Keola began to walk across the street, he looked back and saw someone else “stomping” on the older man's head. (5/1/09 TR: 95-96).

On cross-examination, Keola stated that he had smoked marijuana several times throughout the evening and that he was “feeling high” at some points but that he “went sober up” when he believed a fight was going to happen. (5/1/09 TR: 107-08).

Settling of jury instructions: During the settling of instructions, the defense objected to the court instructing the jury on accomplice liability. (5/5/09 TR: 10). The defense also objected to the court declining to give instructions on “extreme mental/emotional disturbance” and mutual affray. (5/5/09 TR: 12-21).

Dr. William Brady, M.D.: Dr. Brady was a medical doctor with a specialty in “[forensic] pathology or laboratory medicine.” (5/5/09 TR: 25). He was qualified as an expert in the field of forensic pathology. (5/5/09 TR: 32). Nakoa's blood-alcohol test results indicated a BAC of .217. Dr. Brady believed that Nakoa's BAC was likely higher than that at the time of the incident because he had been given a large saline IV and due to the normal dissipation of alcohol over the period of time before the sample was taken at the hospital. (5/5/09 TR: 34-36). Dr. Brady extrapolated that at the time of the incident, Nakoa had the equivalent of two full six-packs of beer or a pint of 80 proof alcohol in his body. (5/5/09 TR: 36-37). The effect of that amount of alcohol would be to “depress the person's normal ability to ... speak, to control their emotions, to act and interact.” (5/5/09 TR: 37-38).

Dr. Brady had noted the injuries that were documented on Nakoa's face. Those injuries were not consistent with a “violent, repetitive beating.” (5/5/09 TR: 38). Common injuries in *18 beating cases would be lacerations above the eyebrow, a [broken nose](#), swollen or bleeding lips or a [broken jaw](#). (5/5/09 TR: 38-39). Nakoa had no fractures. (5/5/09 TR: 39).

Dr. Brady agreed that Nakoa's death had been caused by a “[subarachnoid hemorrhage](#) of an artery that leads to the brain.” (5/5/09 TR: 41). The mechanism that caused such injuries was either a lateral movement or backward movement of the head that resulted in stretching and [tearing](#) of the arteries. (5/5/09 TR: 42-43). Dr. Brady could not identify the specific act that caused Nakoa's death. (5/5/09 TR: 44). Although such injuries could be caused in one-on-one situations, they could also occur in situations where a person received multiple blows. Moreover, while the typical situation involved a person being struck while the head was in a mobile position, usually while a person was standing, it could also occur when a person was lying on the ground. (5/5/09 TR: 49-50). As a result, Dr. Brady could not, to a reasonable degree of medical certainty, rule out the possibility that a kick to the head caused Nakoa's death, or identify the specific blow that caused Nakoa's death. (5/5/09 TR: 44-45, 53-54).

In regards to the internal bleeding found near Nakoa's clavicle Dr. Brady stated that such bleeding could also have been caused by needles inserted in Nakoa at the hospital. (5/5/09 TR: 46-47). As Nakoa suffered from [hepatitis C](#) his blood was not clotting properly, and the insertion of a needle could have caused such bleeding in that area. (5/5/09 TR: 47).

Motion for Judgment of Acquittal: The defense made a motion for judgment of acquittal at the close of evidence. (5/5/09 TR: 56). The court denied the motion. (5/5/09 TR: 57).

Stipulation: The jury was informed that Pada had been charged with Robbery in the Second Degree and Assault in the Second Degree and that on February 2, 2009, he had pleaded guilty to both those offenses. (5/5/09 TR: 59-60).

Defense “C”: The cell phone video shot by Quijano was played for the jury (5/5/09 TR: 61-62).

Jury verdict: On May 6, 2009 the jury returned its verdict finding Acasia guilty of the lesser-included offense of Manslaughter. (5/6/09 TR: 3; RA: 103, 220-23).

Written Motion for Judgment of Acquittal: On May 21, 2010, the defense filed a written motion for judgment of acquittal. (RA: 115-21). The court denied the motion. (6/1/09 TR: 4).

Motion for Revocation of Probation in Cr. No. 06-1-0761: On September 12, 2008 the State filed a motion for revocation of probation in Cr. No. 06-1-0761. [RA (CR No. 06-1-0761): 56-60].

Acasia stipulated to the revocation of probation. On July 13, 2009, the court revoked Acasia's probation and sentenced him to an open term often (10) years to run consecutively to his *19 sentence in Cr. No. 08-1-0774. [RA (CR No. 06-1-0761): 119; a copy of the Order of Resentencing; Revocation of Probation is attached hereto as Appendix “A”].

Sentencing: Acasia was sentenced to a term of twenty (20) years of incarceration, with a mandatory minimum term of six (6) years and eight (8) months as a repeat offender in Cr. No. 08-1-0774. [RA: 220-23; a copy of the Judgment is attached hereto as Appendix “B”; RA (CR No. 06-1-0761): 119; Appendix “A”, attached]. Acasia was sentenced to a term of incarceration of ten (10) years of incarceration in 06-1-0761 to run consecutively to his sentence in CR No. 08-1-0774, for a total term of incarceration of thirty (30) years. (*Id.*).

II. STATEMENT OF THE POINTS OF ERROR

A. The DPA engaged in misconduct by adducing evidence that Acasia was homeless at the time of the incident.

During Anela's testimony, defense counsel asked if she knew where Acasia was living at the time of the incident. She replied that she did not know. (4/29/09 TR: 157).

On cross-examination, the DPA ostensibly attempting to impeach Anela adduced evidence that Acasia was homeless at the time of the incident.

Q [State] ... What do you guys normally do on weekends?

A [Anela] We just stay home and cruise.

Q Okay. Stay home, your home?

A Yes.

....

Q And the reason why you hang out at your home is because at that time Kelii was homeless; right?

A Yes.

Q So when Mr. Shigetomi asked you earlier about if you knew where Kelii lived at that time back on May 17th, 18th and you said no, that wasn't exactly all true?

A Well, it was because I didn't know exactly where he were [sic] staying.

Q Because he's homeless; right?

*20 A Yes.

Q You just kind of left that part out; yeah?

A I'm pretty sure.

Q So you just left that part out; yeah?

A (Nods head up and down.)

(4/29/09 TR: 174-75).

The evidence that Acasia was homeless at the time of the incident had absolutely no relevance to the charged offense and was a thinly-veiled attempt by the DPA under the guise of impeachment of Anela to impugn Acasia's character and color the jury's perception of him by adducing highly prejudicially and non-probative evidence. Accordingly, the DPA's actions constituted misconduct and Acasia's conviction must be vacated and his case remanded for a new trial.

B. The court erred in denying the motion for judgment of acquittal.

On May 21, 2009, the defense filed a written motion for judgment of acquittal (RA v.2: 115-21). The defense contended that there was no substantial evidence that Acasia had caused Nakoa's death where the medical evidence could not identify the specific blow that caused Nakoa's death. (RA v.2: 117-18).

On June 1, 2009, the court denied the motion.

THE COURT: All right.

The Court has carefully considered the motions and was the trial judge in this matter, and there was certainly evidence presented in the record to allow the jury to come to the conclusion they did, so the Motion for Judgment of Acquittal is denied.

(6/1/09 TR: 4).

Based on the divergent and conflicting testimony of the witnesses and the testimony of the medical experts, there was no substantial evidence that could single out Acasia as having recklessly caused Nakoa's death. Accordingly, Acasia's conviction must be reversed.

C. The court's instruction on the use of deadly force in defense of others was prejudicially erroneous.

The jury was instructed on both the use of force and the use of deadly force in defense of others as a defense to the offense of Manslaughter. The court instructed the jury on the use of *21 deadly force in defense of others in relevant part as follows. The use of force upon or toward another person is justified to protect a third person when:

1. Under the circumstances as the defendant reasonably believed them to be, the third person would have been justified in using such force to protect himself or herself; and

2. The defendant reasonably believed that his intervention was immediately necessary to protect the third person.

The third person would have been justified in using deadly force upon or toward Ned Nakoa, Jr. if he or she reasonably believed that deadly force was immediately necessary to protect himself on the present occasion against death or serious bodily injury.

The use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter *or if the defendant knows that he can avoid the necessity of using such force with complete safety by retreating.*

(5/5/09 TR: 80) (emphasis added). The highlighted portion of the instruction failed to properly instruct the jury that the defendant must know that he could avoid the necessity of using such force with complete safety to *Anela*, the third person on whose behalf he was using the deadly force, by retreating. As a result, the jury may have believed that the use of deadly force was not available to Acasia if he could have retreated with complete safety to himself by retreating, even if Anela was still in jeopardy. Accordingly, the instruction was prejudicially erroneous and Acasia's conviction must be vacated and his case remanded for a new trial.

D. There was no substantial evidence to support Acasia's conviction where his use of force or deadly force was justified in defense of Anela.

Assuming arguendo that the justifiable use of deadly force in defense of others was not erroneous (Point of Error C, *supra*) and that a blow from Acasia caused the condition which led to Nakoa's death (Point of Error B, *supra*), there was no substantial evidence to support Acasia's conviction where his use of force or deadly force was justified in defense of Anela. Both Anela and Keola testified that Acasia had only struck Nakoa after he had hit her. (4/29/09 TR: 184, 186, 194; 5/1/09 TR: 93). Based on that testimony, the jury was instructed on the defense of defense of others with the use of force or deadly force.

Justifiable use of force in defense of another person is a defense to the charge of... Manslaughter ... The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution does not meet its burden, then you must find the defendant not guilty.

The use of force upon or toward another person is justified to protect a third person when:

1. Under the circumstances as the defendant reasonably believed them to be, the *22 third person would have been justified in using such force to protect himself or herself; and

2. The defendant reasonably believed that his intervention was immediately necessary to protect the third person.

The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be.

The third person would have been justified in using force upon or toward Ned Nakoa, Jr. if he or she reasonably believed that such force was immediately necessary to protect himself or herself on the present occasion against the use of unlawful force by Ned Nakoa, Jr.

....

Justifiable use of force in defense of another person is a defense to the charge of ... Manslaughter ... The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution does not meet its burden, then you must find the defendant not guilty.

The use of force upon or toward another person is justified to protect a third person when:

1. Under the circumstances as the defendant reasonably believed them to be, the third person would have been justified in using such force to protect himself or herself; and
2. The defendant reasonably believed that his intervention was immediately necessary to protect the third person.

The third person would have been justified in using deadly force upon or toward Ned Nakoa, Jr. if he or she reasonably believed that deadly force was immediately necessary to protect himself [sic] on the present occasion against death or serious bodily injury.

The use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter or if the defendant knows that he can avoid the necessity of using such force with complete safety by retreating.

(5/5/09 TR: 78-80).

Based on the substantial evidence adduced, any use of force or deadly force by Acasia that led to Nakoa's death was justified in defense of Anela. Accordingly Acasia's conviction must be reversed.

E. The court's Order of Resentencing/Revocation of Probation must be vacated.

On September 12, 2008, the State filed its Motion for Revocation of Probation in CR No. 06-1 -00761. [RA (CR No. 06-1-00761): 56-60].

On July 13, 2009, the court revoked Acasia's probation and sentenced him to an open term of ten (10) years of incarceration. [RA (CR No. 06-1-0761): 119; Appendix "A", attached]. The basis for the revocation was, "that Defendant has been convicted of a new crime." (*Id.*).

Based on the foregoing errors raised herein, Acasia's conviction in CR No. 08-1-0774 must ***23** be either vacated and his case remanded for a new trial or reversed. As the sole basis for the revocation of probation in CR No. 06-1-0761 was Acasia's conviction in CR No. 08-1-0774, there is no valid basis for revocation of probation and that order must be vacated and his case remanded for an order denying the Motion for Revocation of Probation and reinstating Acasia's probation.

III. STANDARDS OF REVIEW

Prosecutorial misconduct:

Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction." *State v. Rogan*, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (internal quotation marks and citations omitted) (*quoting State v. Sawyer*, 88 Hawai'i 325, 329 n. 6, 966 P.2d 637, 641 n. 6 (1998)).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." *State v. McGriff*, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994).

“In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant.” *State v. Agrabante*. 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

State v. Mars. 116 Hawai'i 125, 133, 170 P.3d 861, 869 (2007).

Motion for Judgment of Acquittal:

The standard of review applied by the Hawai'i Supreme Court in ruling upon a motion for judgment of acquittal is the same standard applied by the trial court. *State v. Pone*, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995). The standard applied

“upon a motion for judgment of acquittal is whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.”

Id (quoting *State v. Alston*. 75 Haw. at 528, 865 P.2d at 164).

HRPP Rule 29(a) provides in relevant part that a “court on motion of defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses alleged in the charge after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.” A motion for judgment of acquittal, therefore, “tests the sufficiency of the evidence” with regards to each element of the charged offense. *Alston*, 75 Haw. at 527, 865 P.2d at 163. When an appellate court reviews the sufficiency of the evidence, it examines

whether there was substantial evidence to support the conclusion of the trier of fact.... Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

*24 *Pone*, 78 Hawai'i at 265, 892 P.2d at 458 (citations and internal quotations omitted).

Jury Instructions:

When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial. However, error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

Where instructions were not objected to at trial, if the appellant overcomes the presumption that the instructions were correctly stated, the rule is that such erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

State v. Nichols. 111 Hawai'i 327, 334-35, 141 P.3d 974, 981-82 (2006) (internal citations, quotation marks, indentations, brackets and paragraphing omitted). Ultimately, it is the responsibility of the trial court to ensure that the jury is properly charged.

Inasmuch as “the ultimate responsibility properly to instruct the jury lies with the [trial] court,” if trial or appellate counsel fail to raise an objection to an erroneous jury instruction as to which there is a reasonable possibility of contribution to the defendant's conviction and which, consequently, cannot be harmless beyond a reasonable doubt, then the instruction, by its very nature, has affected the defendant's substantial rights-to wit, his or her constitutional rights to a trial by an impartial jury and to due process of law-and, therefore, may be recognized as plain error.

State v. Uyesugi. 100 Hawai'i 442, 60 P.3d 843 (2002).

Furthermore, a defendant is entitled to an instruction on any theory of the defense that had support in the evidence. *State v. Jones*. 96 Hawai'i 161, 168-69, 29 P.3d 351, 358-59 (2001).

[o]ur cases have firmly established that a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be.

*25 *Id*

Order revoking probation:

[A] trial court's decision revoking probation will not be disturbed on appeal absent an **abuse** of judicial discretion. *State v. Huggett*. 55 Haw. 632, 635, 525 P.2d 1119, 1122 (1974). To constitute an **abuse** of discretion, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a litigant. *State v. Sacoco*, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961).

State v. Lazar, 82 Hawai'i 441, 443, 922 P.2d 1054, 1056 (App. 1996).

IV. ARGUMENT

A. THE DPA COMMITTED PROSECUTORIAL MISCONDUCT BY ADDUCING EVIDENCE THAT ACASIA WAS HOMELESS AT THE TIME OF THE INCIDENT.

During its cross-examination of Anela, the DPA engaged in misconduct by adducing prejudicial, non-probative evidence that Acasia was homeless at the time of the incident.

In general, the factors to be considered when determining a claim of prosecutorial misconduct are: 1) the nature of the conduct; 2) the promptness of a curative instruction; and 3) the strength or weakness of the evidence against the defendant. *State v. Maluia*, 107 Hawai'i 20, 24, 108 P.3d 974, 978 (2005).

1. The DPA's question was intended to to prejudice the jury against him by raising the stigma of his homelessness.

During its cross-examination of Anela, the DPA, under the guise of impeaching her testimony on direct that she did not know where Acasia was living at the time of the incident, adduced evidence that Acasia was homeless. This was obviously designed to raise the stigma of homelessness and to prejudice the jury's perception of Acasia. As to the nature of this misconduct, prosecutors are forbidden from using arguments which are “calculated to inflame the passions of the jurors and to divert them, by injecting an issue wholly unrelated to [the defendant's] guilt or innocence into their deliberations, from their duty to decide the case on the evidence.” *State v. Pacheco*. 96 Hawai'i 83, 95, 26 P.3d 572, 584 (2001). (repeated references to defendant as “asshole” constituted prosecutorial misconduct). By adducing evidence that Acasia was homeless, the DPA sought to raise the stigma of

homelessness to prejudice the jury against Acasia with the *26 inevitable assumptions that the homeless are more likely to use drugs or alcohol, or commit crimes. Obviously there was no probative value to this evidence as it was wholly irrelevant. Thus, the only purpose of adducing such testimony was to inflame the passions and prejudices of the jurors and divert them to the fact that Acasia was homeless, “an issue wholly unrelated to [his] guilt or innocence”. Thus, the first prong weighs in favor of Acasia's claim of prosecutorial misconduct.

As to the second prong, the promptness of a curative instruction, there was no curative instruction given to the jury as there was no objection made to the DPA's improper conduct. Accordingly, this factor also weighs in favor of Acasia's claim of prosecutorial misconduct. *See e.g. State v. Wakisaka*, 102 Hawai'i 504 516, 78 P.3d 317, 329 (2003) (holding that where defense counsel did not object to the prosecutor's improper rebuttal argument and where the court did not *sua sponte* give a curative instruction, the “promptness or lack of a curative instruction” factor “weighs heavily in [defendant's] favor.”) Nor were the court's general instructions sufficient to cure the specific prejudice engendered by the slide. *See e.g. State v. Marsh*, 68 Haw. 659, 661, 728 P.2d 1301, 1302-03 (1986) (prejudicial impact of the State's remarks was not rendered harmless by court's general instruction to the jury that the arguments of counsel were not evidence). Thus, this factor also weighs in favor of the defense.

Finally, as to third prong, there was significant conflicting evidence adduced, thus there was not overwhelming evidence of guilt. Indeed, the jury's found Acasia guilty of a lesser-included offense, not the charged offense, thus it is obvious that the State's theory of the case and the evidence adduced was not uncontroverted. Witnesses of varying degrees of credibility had given varying accounts of the offense. As argued *infra*, the expert medical evidence failed to establish the specific act that caused Nakoa's death and there was testimony that established that there could have been up to three different people who struck Nakoa during the incident. Moreover, there was also evidence that Acasia had acted in self-defense. Given the widely conflicting accounts of the incident, the inability to precisely determine the blow that had caused Nakoa's death and the viability of defenses raised by Acasia, this factor, the strength or weakness of the case against the defendant also weighs in favor of Acasia's claim of misconduct.

In sum, as the three salient factors weigh in favor of Acasia's claim, the DPA's conduct in adducing wholly non-probative and highly prejudicial evidence that Acasia was homeless, constituted prosecutorial misconduct. Accordingly, Acasia's conviction in CR No. 08-1-0774 must be vacated and his case remanded for a new trial. Moreover, as this conviction was the basis for the *27 revocation of probation in CR No. 06-1-0761, the Order of Resentencing, Revocation of Probation, must be vacated and the case remanded for an order denying the State's motion to revoke probation and continuing Acasia on probation.

B. THE COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THERE WAS NO SUBSTANTIAL EVIDENCE THAT ACASIA HAD RECKLESSLY CAUSED NAKOA'S DEATH.

The court erred in denying the defense's motion for judgment of acquittal where there was no substantial evidence as to the specific blow that had caused Nakoa's death or that Acasia had administered the fatal punch or kick.

Nakoa was convicted of Manslaughter. The jury was instructed on the elements of that offense as follows:

1. That on or about the 17th day of May, 2008 to and including the 18th day of May, 2008, in the City and County of Honolulu, State of Hawaii, the defendant Kelii J. B. Acasia, Jr., caused the death of Ned Nakoa Jr.; and
2. That the defendant, Kelii J. B. Acasia ... did so recklessly.

(5/5/09 TR: 71). There was no substantial evidence that a blow from Acasia caused Nakoa's death.

Two medical experts testified as to the cause of Nakoa's death, DeAlwis and Dr. Brady. Both agreed that Nakoa's death had been caused by a “[subarachnoid hemorrhage](#)” caused by a blow that had caused the vertebral artery to tear from hyperextension.

Although DeAlwis opined that such a hyperextension was *generally* caused when a person was upright and received a blow to the head causing it to snap back or rotate suddenly, she acknowledged that a blow to the head while the person was on the ground could also cause such a hyperextension. Dr. Brady agreed that “[subarachnoid hemorrhages](#)” generally occurred in “one-on-one” situations, but also added that such injuries could also occur when a person was lying on the ground. While both medical experts agreed that a punch or kick was the likely cause of the hyperextension, neither could identify the specific punch or kick that had actually caused the “[subarachnoid hemorrhage](#)” to occur. Dr. Brady added that he could not, to a reasonable degree of medical certainty, rule out the possibility that a kick to Nakoa's head while he was lying on the ground caused the hyperextension. Thus, while the cause of death ([subarachnoid hemorrhage](#)) was undisputed the specific blow that caused the [subarachnoid hemorrhage](#) was impossible to specify. Accordingly, the testimony of both the State and defense experts failed to provide substantial evidence as to the specific blow that had caused *28 Nakoa's death.

The inability of the experts to specifically identify the blow that had caused Nakoa's death bespeaks the more fundamental issue - there was no substantial evidence that *Acasia* had administered the blow that had caused Nakoa's death. Based on the testimony of the witnesses, there were up to three individuals (two different males and/or a female) who had struck Nakoa and there was either a single punch thrown by a single person, punches and kicks thrown by a single person, a punch and then a kick by two different persons or a punch and then a stomp by two different persons. Perry and Cantera identified *Acasia* as the individual who had struck Nakoa, but could not agree on the number and types of blows (punches and kicks). Clattenburg could not identify the male who he saw hit and kick Nakoa. Wilkinson claimed that *Acasia* had punched and kicked Nakoa, but had described the assailant as wearing markedly different clothes than *Acasia* was wearing on the night of the incident. *Ciudad-Real* appeared to have seen *Acasia* strike Nakoa, but also saw another male in a black t-shirt and black shorts kick Nakoa when he was on the ground. *Ciudad-Real* also claimed that the male that he was fighting with, *Pada*, was the male that had run into the parking garage. *Kiana*, *Anela* and *Nunes* only saw a single punch. *Quijano* saw a girl kick Nakoa while he was on the ground. *Keola* saw another male “stomp” on Nakoa after he fell to the ground. In other words, the witnesses could not agree on who had hit or kicked Nakoa, how many times he had been hit or kicked and who had hit or kicked him. In combination with Dr. Brady's testimony that while it was possible to identify the cause of Nakoa's death, it was impossible to identify the specific blow that had caused death, it is clear that there was no substantial evidence that could single out *Acasia* as administering the blow that caused Nakoa's death.

In sum, there was no substantial evidence to identify the specific blow (punch or kick) that caused Nakoa's death and more fundamentally, there was no substantial evidence to identify *Acasia* as the individual who had administered that blow. Accordingly, *Acasia's* conviction must be reversed.

***29 C. THE COURT'S INSTRUCTION ON THE USE OF DEADLY FORCE IN TO PROTECT A THIRD PERSON WAS PREJUDICIALLY ERRONEOUS AND MISLEADING WHERE IT MISSTATED THE LAW AND ASKED THE JURY TO DETERMINE WHETHER ACASIA HIMSELF COULD RETREAT SAFELY, RATHER THAN WHETHER HE COULD RETREAT WITH COMPLETE SAFETY TO ANELA.**

The court instructed the jury on the defense of use of deadly force for the protection of a third person as follows:
The use of force upon or toward another person is justified to protect a third person when:

1. Under the circumstances as the defendant reasonably believed them to be, the third person would have been justified in using such force to protect himself or herself; and
2. The defendant reasonably believed that his intervention was immediately necessary to protect the third person.

The third person would have been justified in using deadly force upon or toward Ned Nakoa, Jr. if he or she reasonably believed that deadly force was immediately necessary to protect himself on the present occasion against death or serious bodily injury.

The use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter *or if the defendant knows that he can avoid the necessity of using such force with complete safety by retreating.*

(5/5/09 TR: 80) (emphasis added). This instruction was prejudicially erroneous and misleading as the highlighted portion failed to specify that Acasia must have know that he could avoid the necessity of such with complete safety *to Anela* by retreating.

[HRS § 703-305](#) states in relevant part:

[§ 703-305](#). Use of force for the protection of other persons

(1) Subject to the provisions of this section and of section 703-310, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) Under the circumstances as the actor believes them to be, the person whom the actor seeks to protect would be justified in using such protective force; and (b) The actor believes that the actor's intervention is necessary for the protection of the other person.

(2) Notwithstanding subsection (1):

(a) When the actor would be obliged under section 703-304 to retreat, to surrender the possession of a thing, or to comply with a demand before using force in self-protection, the actor is not obliged to do so before using force for the protection of another person, unless the actor knows that the actor can thereby secure the complete safety of such other person; and

(b) When the person whom the actor seeks to protect would be obliged under section 703-304 to retreat, to surrender the possession of a thing or to comply with a demand if the ***30** person knew that the person could obtain complete safety by so doing, the actor is obliged to try to cause the person to do so before using force in the person's protection if the actor knows that the actor can obtain the other's complete safety in that way; and (c) Neither the actor nor the person whom the actor seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in the actor's or the person's own.

These provisions must be read in conjunction with the provisions of [HRS § 703-304](#). Under [HRS § 703-304\(5\)\(b\)](#), the use of deadly force in *self-protection* is not justifiable if “[t]he actor knows that he can avoid the necessity of using such force with complete safety by retreating ...”

Based on the provisions of [HRS §§ 703-304](#) and [703-305](#), the court's instruction to the jury should have read,

The use of deadly force ***in protection of a third person*** is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter or if the defendant knows that he can avoid the necessity of using such force with complete safety ***to the third person*** by retreating.

By contrast, the court's instructions omitted the reference to the third person and appeared to preclude the use of deadly force if Acasia himself could have avoided the necessity of using such force with complete safety *to himself* by retreating. Thus, the jury may have rejected the use-of-deadly-force-in-protection-of-others defense because it believed that Acasia could have retreated with complete safety *to himself* by retreating, even if Acasia believed that Anela was still in jeopardy and even if Anela would herself have been justified in using such deadly force in self-protection without retreating.

This issue was addressed by the ICA in *State v. Mark*, 120 Hawai'i 499, 210 P.3d 22 (App. 2009). In *Mark*, the jury had been instructed on the defense-of-others defense in relevant part as follows:

[7] The use of deadly force is not justifiable if the Defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter, *or if the Defendant knows that he can avoid the necessity of using such force with complete safety by retreating.*

Id. at 523, 210 P.3d at 46 (emphasis added). On appeal, the defendant claimed that the instruction was erroneous as it “misstated the law by asking the jury to determine whether [defendant] could retreat with complete safety to himself, rather than whether he could retreat with complete safety to [others].” *Id.* at 526, 210 P.3d at 49. The ICA disagreed with the defendant's interpretation of the instruction stating that, “[r]ead in context of the entire instruction, the ‘necessity’ for using force in *31 paragraph 7 refers to the threat to the third party, and the instruction thus advises the jury that the defendant must retreat only if he or she can avoid ‘the necessity of such force with complete safety’ of that third party.” *Id.* However, the ICA recognized that under the defendant's interpretation, “anyone who observes an innocent person about to be killed would be obliged to retreat as long as he or she could save himself or herself in the process.” *Id.*

In fact, the ICA's recognition that the instruction as given would not allow the use of deadly force for protection of others by a defendant if the defendant could retreat in complete safety to himself bespeaks the problematic nature of the wording of the instruction. The instruction fails to clarify that the relevant inquiry is whether the defendant could retreat in complete safety *to the person* on whose behalf he was prepared to use the deadly force in self-protection. On the facts of the instant case, Acasia could only have used deadly force against Nakoa if he could not have retreated with complete safety *to Anela*. Instead, under the wording of the court's instruction, the jury may have found that Acasia was not justified in using deadly force to protect Anela because Acasia could have avoided the necessity of using deadly force with complete safety *to himself* by retreating, regardless of whether Anela was still in jeopardy from Nakoa.

Indeed, the ICA in *Mark* recognized the such an interpretation was possible as it then went on to state, “[e]ven if we were to find that the instruction was a potentially misleading statement of the law, the error would be harmless beyond a reasonable doubt.” *Id.* at 526, 210 P.3d at 49. Clearly if the ICA had held outright that the instruction was not erroneous, it would not have found it necessary to rule on the issue of whether any error in the instruction was harmless beyond a reasonable doubt. In *Mark*, the ICA ruled that any error in the instruction was harmless beyond a reasonable doubt because under the facts of the case, the defendant could not have “retreated in any event” because he was “cornered in the back of the store” when he used the deadly force. *Id.* By contrast, in the instant case Acasia had the ability to retreat, thus the question of whether he could have avoided the necessity of using deadly force with complete safety to Anela was a viable question of fact for the jury. As the jury found that Acasia had recklessly caused Nakoa's death, it should have then considered his defense-of-others defense in regard to the safety of Anela, not Acasia himself. However, the court's erroneous instruction failed to properly instruct the jury in that regard and the jurors may have rejected the defense because they believed that Acasia could have retreated without using deadly force with complete safety to himself, not Anela. Hence the error in the instructions was not harmless beyond a reasonable doubt as in *Mark*, *supra*.

*32 Based on the foregoing, the court's instruction to the jury on deadly force in defense of others was prejudicially erroneous and misleading as it incorrectly stated the law of defense of others (HRS §§ 703-304 and 703-305) and thereby induced the jury to improperly reject that defense in regards to Acasia's use of deadly force against Nakoa. Accordingly, Acasia's conviction must be vacated and his case remanded for a new trial.

D. ACASIA'S CONVICTION MUST BE REVERSED WHERE HIS USE OF FORCE THAT CAUSED THE CONDITION THAT LED TO NAKOA'S DEATH CONSTITUTED THE JUSTIFIABLE USE OF FORCE IN DEFENSE OF ANOTHER PERSON.

Assuming arguendo that there was no error in the court's instruction on the use of deadly force in defense of others (Point of Error C, *supra*) and that a blow administered by Acasia led to the condition that caused Nakoa's death (Point of Error B, *supra*) and that the blow met the legal definition of “deadly force”, there was no substantial evidence to support Acasia's conviction for Manslaughter where any use of deadly force or deadly force was justifiable in defense of Anela.

The court provided the jury with an instruction on the defense of justifiable use of force in defense of another person and justifiable use of deadly force. (5/5/09 TR: 78-80; the court's instruction is included herein in Point of Error D, *supra*, and is hereby incorporated by reference).

Undisputed medical evidence established that at the time of the incident Nakoa was highly intoxicated, with a post-incident measured BAC of 217 that Dr. Brady testified was likely higher at the time of the incident. This was the equivalent of drinking two full six-packs of beer or a pint of 80 proof alcohol. Per Dr. Brady, persons with that level of intoxication would have a depressed ability to control their emotions and to act and interact. It was also undisputed that Nakoa had initiated the confrontation with Acasia when he approached him and used his body or arms to try to force Acasia away from the area where Ciudad-Real and Pada were fighting.

Anela testified that when she tried to intervene and assure Nakoa that she and Acasia were just going to go home, he shoved her face and then hit her in the mouth. Keola confirmed that he had been watching Nakoa confront Acasia and had then seen Nakoa swing his arm and hit Anela somewhere on her upper body. Anela informed the police of Nakoa's actions and showed them the [injury to her lip](#). (4/29/09 TR: 168-69).

1. Acasia was justified in using force to protect Anela.

Although Acasia did not testify, under the circumstances described in the testimony of *33 Anela and Keola, Acasia was clearly justified in using force or deadly force in defense of Anela. First, under the circumstances as Acasia reasonably believed them to be, Anela would have been justified in using force to protect herself. Nakoa himself confronted Acasia and Anela. Nakoa was highly intoxicated and had a beer in his hand. Anela was also in a more vulnerable condition, as she was three to four months pregnant at the time. Nakoa not only verbally confronted Acasia, but also physically confronted him, either blocking him with his body and directing him backward or pushing him with his free hand, depending on the version testified to by the witnesses. In any event, Nakoa took it upon himself to insert himself into the situation. After Anela tried to reassure Nakoa that they were leaving, he assaulted her by pushing her face and then hitting her in the mouth. Clearly under such circumstances, confronted by a drunk stranger who physically assaulted her, Anela would have been justified in using force to protect herself.

Second, Acasia reasonably believed that his intervention was immediately necessary to protect Anela. Again, Nakoa was highly intoxicated, holding a beer in his hand and confronted Acasia verbally and physically. Without any provocation, he had then pushed and struck Anela who was three to four months pregnant. Further, Acasia had already been involved in an incident with Ciudad-Real and was in the vicinity of the incident occurring between Ciudad-Real and Pada. Given this highly-charged atmosphere, Acasia could reasonably believe that the Nakoa, a drunken stranger who had confronted him and his pregnant girlfriend without provocation, was posing an immediate and significant danger to Anela. Clearly, it was reasonable for Acasia to believe that it was immediately necessary for him to intervene and to use force to protect Anela.

2. Acasia was justified in using deadly force to protect Anela.

Even if Acasia's action was considered to constitute the use deadly force, he was justified in using deadly force to protect Anela. Again, Nakoa was highly intoxicated, holding a cup of beer, and had confronted Acasia without any provocation. Nakoa had then initiated the physical contact by either blocking Acasia with his body or pushing him with his free hand. Finally, when Anela attempted to redirect Nakoa and assure him that they didn't want any trouble, Nakoa attacked her, pushing her and then striking her on the face. Given the fact that Anela was pregnant, she was especially vulnerable to injury to herself and her

unborn child.³ Under such circumstances, she *34 could have believed that she was in danger of suffering serious bodily injury⁴ and/or death from Nakoa's attack.

Under the aforementioned circumstances and given Anela's more vulnerable condition, it was reasonable for Acasia to believe that he needed to immediately intervene to protect Anela. *See supra*.

Finally, the use of deadly force was available to Acasia because he did nothing to provoke the use of force by Nakoa and he could not avoid the necessity of using such force with complete safety to Anela by retreating. Again, it was undisputed that Nakoa had gone out of his way to confront Acasia. Whether Nakoa had blocked Acasia with his body or pushed him, Nakoa had also initiated the use of physical force. Nakoa had not been involved in the initial incident and Acasia had done nothing to invite his interaction. Moreover, there was no evidence that Acasia could have avoided the necessity of using such force with complete safety to Anela. Anela was close enough so that Nakoa could shove her and then hit her and there was no evidence that she could have safely gotten away from Nakoa, especially given her more vulnerable condition. Accordingly, there was no evidence that Acasia could have avoided the use of such force and still ensured Anela's safety.

Based on the foregoing, Acasia was justified in using force or deadly force to protect Anela from the unprovoked and sudden attack by Nakoa who was highly intoxicated. Thus, there was no substantial evidence to support Acasia's conviction as his actions constituted the justifiable use of force in protection of Anela. Accordingly, Acasia's conviction must be reversed.

E. ACASIA'S REVOCATION OF PROBATION IN CR. NO. 06-1-0761 MUST BE VACATED WHERE IT WAS BASED SOLELY ON HIS CONVICTION IN CR NO. 08-1-0774.

The sole basis for Acasia's revocation of probation in CR No. 06-1-0761 was his conviction in CR No.08-1-0774. [RA (CR No. 06-1-0761): 119; Appendix "A", attached]. Based on the errors raised herein that would result in the vacating or reversal of his conviction in CR No. 08-1-0774, his revocation in CR No. 06-1-0761 must be vacated and that case remanded for an order denying the motion for revocation of probation and reinstating Acasia on probation.

***35 V. RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

Relevant statutes, rule and constitutional provisions are attached hereto as Appendix "C".

VI. CONCLUSION

Based on the foregoing arguments and authorities cited Defendant-Appellant respectfully requests that this Honorable Court: 1) vacate his conviction and remand his case for a new trial if it finds the errors specified in Points of Error A or C; or 2) reverse his conviction if it finds the error specified in Points of Error B and D; and 3) vacate the Order of Resentencing; Revocation of Probation in CR No. 06-1-0761 if it finds any of the aforementioned errors in Points of Error A-D.

***36 STATEMENT OF RELATED CASES**

Counsel is unaware of any related cases pending in the Hawai'i courts or agencies.

Footnotes

¹ Wilkinson estimated that Acasia was about 1-2 inches taller than Nakoa. (4/28/09 TR: 102).

² DeAlwis clarified that the terms meant the bruise was "scattered over the right forehead and scalp" and wasn't obvious. (5/1/09 TR: 38-39).

- 3 While the defense-of-others defense would not apply to the unborn child (*see State v. Jardine*, 101 Hawai'i 3, 61 P.3d 514 (2002)), her condition rendered her more vulnerable to injury and resultant complications.
- 4 "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

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